

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

FILED
February 29, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 JOE W. SMITH,)
)
 Appellant)

NO. 02C01-9412-CR-00270
SHELBY COUNTY
HON. JOSEPH B. DAILEY, JUDGE
(Second Degree Murder - Sentencing)

FOR THE APPELLANT:

William D. Massey
100 North Main Street
Suite 3010
Memphis, Tennessee 38103
(Appeal Only)

Cary Woods
147 Jefferson Avenue
Suite 1011
Memphis, Tennessee 38103
(Trial Only)

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Darian B. Taylor
Assistant Atty. Gen. & Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

John W. Pierotti
District Attorney General

James C. Beasley
Assistant District Attorney General

Amy P. Weirich
Assistant District Attorney General
Criminal Justice Complex, Third Floor
201 Poplar Avenue
Memphis, Tennessee 38103

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Joe W. Smith, was indicted for murder in the first degree after he confessed to killing David Jones outside a pool hall in Shelby County. The appellant pled not guilty to the charge, was tried by a Shelby County jury and found guilty of second degree murder. His appeal pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure challenges only the sentence imposed by the trial court.

The appellant claims that the twenty-year (20) sentence imposed by the trial court in this case was improper for three reasons. He argues that:

- (1) One of the enhancement factors applied by the trial court was inapplicable to the case.
- (2) The trial court erred when it refused to apply certain mitigating factors when determining the sentence.
- (3) The trial court gave undue weight to the enhancement factors which applied in the case while failing to give due weight to the mitigating factors which applied.

After a careful review of the trial transcripts, briefs of the parties, and the applicable law, we hold that the trial court did not err when it imposed a twenty-year (20) sentence in this case.

On the evening of February 5, 1994, the appellant and his fiance went to a pool hall located in Shelby County. While there, the appellant played a game of pool against David Jones, the victim in this case. The two men were not acquainted until that evening. A disagreement over whether the appellant owed the victim five dollars for the pool game ensued, and there was a certain amount of verbal wrangling between the appellant, the victim, and the victim's friends. At some point during the evening the appellant believed that a physical brawl might erupt and so he called his brother who arrived at the pool hall sometime later. The victim and his associates left the pool hall and the appellant followed them outside. The appellant testified that he was concerned that the victim and his friends were going to vandalize his car and that is why he followed them into the parking lot. Once in the parking lot, the victim made

a gesture which the appellant said he construed as the victim reaching for a gun. At that point, the appellant pulled out his own pistol and shot the victim twice, killing him.

The appellant fled the scene and threw his gun in the Mississippi River. The appellant turned himself in the next day after consulting with his family about what he had done.

Although the appellant contended at trial that he shot the victim in self-defense, the jury chose not to believe him and instead found him guilty of murder in the second degree.

The presentence report and the evidence introduced at the sentencing hearing revealed that the appellant was twenty-one (21) years old at the time of the crime and had never been convicted of a felony. However, the appellant had been arrested and convicted for numerous misdemeanor offenses as an adult and had several scrapes with the law as a juvenile. Since leaving high school in the tenth grade, the appellant has worked steadily. Additionally, although still professing that he killed the victim in self-defense, the appellant expressed remorse for the killing.

When a defendant complains of his or her sentence, we conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990 Repl.). This presumption, however, is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). However, the burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments.

In determining an appropriate sentence, the Court shall consider the following:

- (1) any evidence from the trial and sentencing hearing;
- (2) the presentence report;
- (3) the principles of sentencing;
- (4) the nature and characteristics of the offense;
- (5) information offered by the parties concerning enhancing and mitigating factors as found in Tennessee Code Annotated sections 40-35-113 and 114; and
- (6) the

defendant's statement in his or her own behalf concerning sentencing. Tenn. Code Ann. § 40-35-210(b) (1995 Supp.). Additionally, section 210 provides that the minimum sentence within the range is the presumptive sentence. Tenn. Code Ann. § 40-35-210(c) (1995 Supp.). If there are enhancing and mitigating factors, the Court must start at the minimum sentence in the range and enhance the sentence based upon the appropriate enhancement factors and then reduce the sentence within the range based upon the appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1995 Supp.).

In this case the trial court orally placed on the record which enhancement and mitigating factors it found, as well as its findings of fact as required by Tennessee Code Annotated section 40-35-209. Tenn. Code Ann. § 40-35-210(f) (1995 Supp.).

We have determined that the trial court's findings with regard to the sentence imposed and contained within the record are adequate to afford this Court a meaningful review of the appellant's sentence. Further, because the record reveals that the trial court considered the principles of the Sentencing Reform Act of 1989 and the relevant facts and circumstances of the case, our review shall be de novo with the presumption of the correctness of the trial court's judgment.

The appellant's first contention is that one of the enhancement factors applied by the trial court was inapposite to a murder case such as this one. Specifically, he claims that the enhancement factor found at Tennessee Code Annotated section 40-35-114(10), which provides that a sentence may be enhanced if "[t]he defendant had no hesitation about committing a crime when the risk to human life was high," should not have been applied in this case. We disagree with the appellant and hold that the trial court properly applied the factor in this case because the appellant fired his weapon outside a pool hall on a Friday night when there were several other people with the victim. The trial court found that at the time of the shooting there were patrons coming and going in and around the premises. As the trial court stated, "It is not as

though they were out on some desolate road in the middle of Fayette County where they were the only two people present. There were other people around, and to start firing a gun in those circumstances would certainly indicate a lack of hesitation about committing a crime when risk to human life was high."

The appellant cites a variety of unreported cases from this Court to support his position that this enhancement factor can never apply in a murder case. It is true that this Court found in several of the cases cited by the appellant that enhancement factor ten (10) could not be used to enhance a sentence because under the particular facts of those cases, the factor constituted an essential element of the offense. See, e.g., State v. Reedar Junior Robbins, No. 6 (Tenn. Crim. App., at Jackson, March 27, 1991), perm. to appeal denied (Tenn. 1991); State v. Ralph Thompson, No. 03C01-9306-CR-00177 (Tenn. Crim. App., at Knoxville, June 15, 1994) perm. to appeal denied (Tenn. 1995). However, the appellant misapprehends the rule concerning the application of enhancement factor ten (10). The correct rule is best expressed by this Court's holding in State v. Johnny Parker, No. 03C01-9307-CR-00214 (Tenn. Crim. App., at Knoxville, November 22, 1994) perm. to appeal denied (Tenn. 1995). In Parker, citing State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993), we recognized that enhancement factor ten (10) "may apply if the proof establishes a risk to the life of or potential bodily injury to persons other than the victim." Id. In Parker, we determined that where the appellant had fired his weapon twice into a car which contained two people, his actions placed someone other than the victim at risk and accordingly concluded that the trial court had correctly applied enhancement factor ten (10) in that case. Id. In accordance with Parker and Hicks, the appellant's willingness to put the lives of many at risk was adequately demonstrated when he fired his weapon outside of the pool hall on a Friday night when others besides the victim were near. Accordingly, this issue is without merit.

The appellant next contends that many of the mitigating factors proffered by the appellant were improperly rejected by the trial court and should have been considered in his sentencing. The trial court rejected the following specifically enumerated statutory mitigating factors:

- (2) The defendant acted under strong provocation.
- (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.
- (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct.

Tenn. Code Ann. § 40-35-113 (1990 Repl.).

The trial court rejected factor two (2) because it found that whatever provocation from the victim there might have been was trivial and insubstantial. Factor three (3) was rejected because the trial court found no evidence that would excuse or justify the appellant's conduct. The trial court rejected factor eleven (11) because a verdict of guilt of murder in the second degree by definition means that there was a sustained intent to violate the law. The record supports the trial court's rejection of these statutory mitigating factors.

Additionally the trial court rejected five (5) other mitigating factors proffered by the appellant.¹ As phrased by the appellant, these factors are:

- (1) There is a strong possibility of a return of the offender to a normal life in the community.
- (2) The defendant has the capacity to adjust to law-abiding behavior.
- (3) The defendant's criminal conduct was the result of circumstances unlikely to recur.
- (4) There was a confession before trial.

¹ These were offered pursuant to the "catch-all" provision found at T.C.A. § 40-35-113(13) which provides that the court may consider any other mitigating factor consistent with the purposes of the Sentencing Reform Act of 1989.

- (5) The defendant has cooperated with authorities throughout the proceedings.

The trial court found that the first three (3) non-statutory mitigating factors listed above were essentially the same factor, that is, that the appellant was unlikely to find himself on the wrong side of the law again. These factors were rejected because the court believed that the appellant's history of carrying a pistol as a matter of course in violation of the law coupled with his substantial history of criminal behavior flew in the face of the appellant's contention that he would return to a life as a law abiding citizen in the community. We agree.

The record supports the trial court's refusal to consider the appellant's "confession" as a mitigating factor. The record reveals that the appellant has never actually confessed to the second degree murder of the victim for which he was convicted. Rather, the appellant has "confessed" to what would be considered a lawful killing, that is, a killing of another while acting in self-defense. The jury rejected the appellant's claim of self-defense. The trial court, having approved the verdict, could not have used the appellant's statement that he acted in self-defense as a mitigating factor. The record also supports the trial court's refusal to consider the appellant's cooperation with authorities as a mitigating factor because before the appellant cooperated with authorities, he fled the scene of the crime and disposed of the gun in the Mississippi River.

Although the court rejected many of the mitigating factors offered by the appellant, the court did apply some mitigating factors when arriving at the mid-range sentence. The trial court found that to the extent that the appellant had worked substantially and continually from the time he was in high school, his prospects for rehabilitation were relatively good. Additionally, the trial court found that the appellant's lack of any prior felony convictions, the remorse that he had expressed for the crime, and the fact that the appellant was a young man at the time the crime was committed, all mitigated the sentence imposed by the trial court.

The record fully supports the trial court's findings with regard to all mitigating factors proposed by the appellant; accordingly, we find no error with regard to the court's rejection and acceptance of the various mitigating factors submitted by the appellant.

Finally, the appellant argues that the trial court improperly weighed the enhancement and mitigating factors when it sentenced the appellant to twenty (20) years imprisonment. In addition to the mitigating factors previously discussed in this opinion, the trial court found the following enhancement factors:

- (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.
- (8) The defendant has a previous history of unwillingness to comply with conditions of a sentence involving release in the community.
- (9) The defendant possessed or employed a firearm . . . during the commission of the offense.
- (10) The appellant had no hesitation about committing a crime when the risk to human life was high.

Tenn. Code Ann. § 40-35-114 (1995 Supp.).

After a careful review of the record, we hold that the trial court gave "due consideration and proper weight" to the relevant factors and that its findings were adequately supported by the record. Accordingly, we will not reweigh the mitigating and enhancing factors applied in this case. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

PAUL G. SUMMERS, JUDGE